

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**

**ELRC CAUSE E024 OF 2024**

**MUNIR MULJI.....CLAIMANT**

**VS**

**RAI PLYWOODS(KENYA) LTD.....RESPONDENT**

**JUDGMENT**

Introduction

1. After approximately three decades of what seemed to be a smooth employee-employer relationship, the connection between the Claimant and the Respondent encountered serious headwinds and ultimately collapsed around January 15, 2024. The Claimant argued that the Respondent ended the relationship unfairly and unlawfully, leading to this suit, in which he seeks declaratory and compensatory damages.
2. Upon being served with summons to enter appearance, the Respondent filed a memorandum of appearance dated 18th April 2024, and a Memorandum of Response dated 13th May 2024. They denied the Claimant's cause of action and entitlement to the reliefs sought.
3. At the hearing, the parties adopted their witness statements filed herein as their respective evidence in chief, and tendered the documents filed under their lists of documents as their documentary evidence.

The Claimant's case

4. It is the Claimant's case that he first came into the employment of the Respondent in February 1993 as their Branch Manager, Mombasa Office. His gross monthly salary was KShs. 356, 950. Additionally, he was entitled to a Company vehicle, an operating allowance for the vehicle, including fuel, and an enhanced Medical Cover.
5. The Respondent did not issue him with any written contract as required by law, and in fact, he was not in the habit of doing so.
6. He consistently served the Respondent's branch diligently and performed his duties with professionalism in accordance with the Respondent's expectations.
7. In 2022, the Respondent started creating unfavourable working conditions in his workplace, resulting in diminished efficiency. This, the Respondent did by failing

and or refusing to issue him with a written contract of employment, stopping payment of his monthly salaries due and payable from November 2022 to January 2024, failing to supply to the branch, items in high demand to facilitate sales, and failing to give proper directions and guidance on how to deal with specific customer demands.

8. Further, the Respondent unilaterally altered the terms of his employment to his detriment. It unilaterally terminated his Insurance Health Policy with Kenindia Assurance with effect from 1st July 2022, and declined to reinstate it or secure an alternative for him, failed to settle or reimburse the Claimant the expenses incurred as fuel and service costs for the Company vehicle, failed to remit the statutory deductions, including NSSF and NHIF, and vide a letter dated 26th January 2023, relegated him from the branch Manager position, to a sales position in Eldoret.
9. At the time, the Claimant was receiving the transfer letter to Eldoret dated 26th July 2023, he was facing several challenges, including health challenges occasioned by the stress due to lack of money to sustain himself and his family due to non-payment of his salaries by the Respondent.
10. On 8th August 2023, he wrote an email to the Respondent raising several concerns, including non-payment of his salary, and also sought directions on his designated position in his new station, and the issue of his formal handing over of the Mombasa office. He also sought for time due to his financial and health issues.
11. The letter elicited a response from the Respondent. In their letter dated 15th August 2023, they stated that paying his salary was a challenge for them, that the suspension of his medical cover was due to cash flow constraints, and that the relocation dates to Eldoret would be agreed upon.
12. On 31st August 2023, he received a letter from the Respondent directing him to take a full stocktake of all stock at the Mombasa Branch and to clear all accumulated leave days before reporting to the new station in Eldoret. The letter further indicated that the Respondent was doing everything possible to address the issue of unpaid salaries.
13. On 15th November 2023, he instructed his Advocates to issue the Respondent a demand letter for the unpaid salaries, which had then remained unpaid for a year. On 28th November, 2023, the Respondent's Advocates acknowledged receipt of the demand letter on their behalf.
14. On 14th January 2024, the Respondent's Finance Controller, who had travelled to Mombasa, and the Claimant agreed to jointly conduct stocktaking and the handing over of the Mombasa Branch on 15th January 2024. Indeed, the exercise was conducted on 15th January 2024.
15. Later, during their lunch on 15th January 2024, the Respondent's Finance Director informed him that he had effectively been removed from the Payroll and that he was no longer an employee of the Respondent. He was further advised not to report to the Eldoret Office in the circumstances.
16. The termination was unfair and unlawful, as it was without justifiable and valid cause, a written termination notice, issuance of a notification to the Claimant

and allowing him an opportunity to defend himself, and paying him the entitled terminal dues.

17. On 16th January 2024, he handed over the Company motor vehicle to the Respondent.
18. The Claimant contended that by reason of the premises, he is entitled to the following remedies:

- a) Payment of the salary arrears for a 14-month period from November 2022 to January 2024.....KShs. 4,997,300.
- b) One month's salary in lieu of Notice.....KShs. 356,950.
- c) Compensation for unlawful termination equivalent to 12 months' salary..... KShs. 4,283,400.
- d) Service pay for the period under which NSSF deductions were not remitted by the Company from November 2022 to January 182, 975.

#### The Respondent's Case

19. The Respondent presented one witness, Henry Okola, its Human Resources Manager, to testify on its behalf. The witness stated that the Claimant was employed by the Respondent as a Sales Manager in February 1993, at the Respondent's Mombasa Branch. At the time of separation in the year 2022, he was earning a monthly salary of KShs. 356, 950.
20. The witness further stated that the Respondent has been at all material times in the business of legally extracting timber from the forest. It entered a financial crisis following the 2018 gazetting of a logging ban, which remains in effect to date.
21. Following the ban and due to the resulting slowdown in the Respondent's business, the Respondent decided to consolidate part of its operations in the Mombasa office with the Head office to avoid redundancy in its staff.
22. On 26th July 2023, the Respondent effectively communicated to the Claimant in advance of the need to redeploy him to Eldoret. Subsequently, the Claimant raised concerns about his health, stating that it would impair an immediate relocation to Eldoret. Consequently, the Respondent extended the reporting date to 15th September 2023 and also extended support for the relocation to save the Claimant costs.
23. The Claimant was instructed to undertake the handover process within the said period, which he never did.
24. The Claimant did not report to the Eldoret Office as directed. Rather, he decided to abscond from duty on 15th September 2023 and was not courteous enough to inform of his absence. 25. The witness further stated that the Respondent was maliciously served with a demand letter on 15th November 2023 by the Claimant's Advocates, claiming constructive redundancy and unfair termination, yet the Claimant was not at any point terminated on account of redundancy but absconded from duty and failed to report to work.
26. The Respondent responded to the demand letter on 13th December 2023, addressing the issue therein and indicating that the Claimant had not handed

over, nor had he returned the Company's Motor Vehicle Registration Number KBY 141J, nor attended any of the Respondent's Branches to explain his absence from duty.

27. He further stated that the Claimant's Advocate, through a letter dated 15th January 2024, indicated the intention to sell the Respondent's said motor vehicle assigned to the Claimant to recover the alleged salary arrears.
28. The Claimant did not eventually report to Eldoret.

### **Analysis and Determination**

29. I have carefully considered the pleadings by the parties herein, their evidence, and the respective submissions by their Counsel, and the following issues emerge for determination; a) Whether the Claimant's employment was unfairly and unlawfully terminated.  
b) Whether the Claimant is entitled to the reliefs sought.
30. Inarguably, the parties took diametrically opposed positions on how their employment relationship ended. The Claimant contended that he was verbally dismissed on 15th January 2024, when the Respondent's Director, Mr Arun Kumar Singh, informed him that his employment had been terminated and that he had been removed from the payroll. The Respondent, on the other hand, contended that the Claimant absconded from duty and, as such, the termination was not at the Respondent's initiative.
31. The evolution of labour law has seen a decisive shift from the rigidities of the "at-will" employment doctrine toward a more nuanced understanding of the employment relationship as a cornerstone of human dignity. Modern judicial systems increasingly recognise that a job is not merely a commercial exchange but a fundamental component of an individual's identity and social standing. In this context, the doctrine of security of tenure serves as a critical safeguard against the arbitrary exercise of managerial power. Employment relationships are severed only for a fair and valid reason.
32. And it is by reason of the aforementioned shift that the Employment Act, 2007, places upon the employer a heavy duty to, in a dispute regarding termination, prove the reason for the termination, and that the reason[s] was fair and valid.
33. Procedural justice is the procedural twin of substantive fairness. The application of the principles of natural justice – specifically the right to a fair hearing is paramount in the workplace disciplinary proceedings. The process by which a decision is reached is often as important as the decision itself. In the absence of procedural fairness, even a substantively justified dismissal would be rendered unlawful, as the lack of a fair process undermines the legitimacy of the employer's action.
34. In the case of Pius Isindu Machafu vs Lavington Security Guards Limited ..... the Court of Appeal aptly captured it thus;  
“ .....
35. Desertion of duty is a serious infraction that constitutes gross misconduct under section 44 of the Employment Act and can justify summary dismissal. However, an employer cannot simply presume desertion. To rely on it as the basis for

termination, the employer must present clear and unequivocal evidence that they made genuine efforts to contact the employee, sought an explanation for the unauthorised absence, and notified the employee of the intention to take disciplinary action. Any termination must then be carried out in strict compliance with the requirements of procedural fairness.

36. In *Godfrey Anjere v Unique Suppliers Limited* [2015] KEELRC 1413 [KLR], cited by Counsel for the Claimant, the Court held;  
“ In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice on an employee who may be away from work for a lawful or reasonable excuse, such as illness or circumstances beyond their control, and yet unable to communicate to the employer in good time.”
37. The Respondent’s Counsel contended that the Respondent neither dismissed nor terminated the Claimant. Instead, the Claimant, through their own conduct, brought the relationship to an end—effectively a case of self-termination disguised as unfair dismissal. With all due respect, this well-articulated submission appears to lack coherence in light of the legal principles governing desertion as established by judicial precedent. The desertion of duty by an employee, in itself, does not automatically constitute a termination of the employment contract. Instead, it may only serve as a basis for the employer to lawfully terminate or dismiss the employee.
38. If, as it alleged, the Respondent was convinced that the Claimant had absconded from duty, it had a perfect opportunity to express that intention, either directly or through its Advocate, to take disciplinary action against him for his unauthorised absence from the new station to which he had been redeployed, to ask him to make a representation on the intention and the grounds, and, upon considering the representation, to make a final decision on the matter. The Respondent did not do so. Considering this, I take a firm view that the assertion of desertion is unconvincing.
39. The foregoing notwithstanding, this Court is cognisant of the stipulations of Section 47[5] of the Employment Act and the twin but sequential legal burden it sets out. The employee bears the initial burden of demonstrating that an unlawful termination or wrongful dismissal occurred. To discharge this burden, the employee must put forward a prima facie case that the termination or summary dismissal lacked substantive and/or procedural fairness. Only after the employee discharges this burden does the evidential burden shift to the employer to justify the termination or summary dismissal.
40. On 15th November 2023, pursuant to the instructions of the Claimant, the Claimant’s Counsel wrote to the Respondent a comprehensive and detailed demand letter titled "Constructive Redundancy/Constructive Unfair Termination of Mr Munir Mulji [Payroll No. 5979]. The letter indicated that, at that time, the Claimant regarded his employment as terminated and threatened legal proceedings against the Respondent, including claims for unjust dismissal and outstanding salary arrears.

41. It is difficult to understand how the Claimant can argue that his employment ended on 15 January 2024, yet he considered it terminated on 15 November 2023. He must have been either constructively dismissed in November 2023 or verbally terminated on 15 January 2024; both cannot be true.
42. Having decided to be ambiguous on this crucial matter, it is not difficult to reach the inevitable conclusion that the Claimant failed to discharge his burden of proving unlawful termination. His claim for unfair termination must therefore collapse on this finding.
43. I now turn to consider whether the Claimant is entitled to the reliefs sought. It is important to note at this juncture that the reliefs sought by the Claimant fall into two categories. Those dependent on his claim for unfair termination, on the one hand, and those independent of the claim, on the other. Those that belong to the former category, such as compensation for unfair termination pursuant to section 49[1][c] of the Employment Act, and notice pay, must also collapse with the claim.
44. The Claimant sued for, among other things, service pay for the period during which the

Respondent failed to remit NSSF deductions, from November 2022 to January 2024, amounting to Kenya Shillings 182,975. Qualifying the exclusionary stipulation of Section 35[6] of the Employment Act, the Claimant argued that the Respondent's failure to remit NSSF contributions on the Claimant's account technically rendered him not a member of NSSF, and as such, he became an employee entitled to the benefit, service pay. To support this point, he cited the case of *Wanjai v Mediamax Network Limited* [2024] KEELRC 1085[KLR].

45. The Respondent submits that this Court should allow itself to be persuaded by the decision in *Oruko vs Roto Moulders* [2020] eKLR and direct the Respondent to settle the non-remitted amounts instead of the punitive measure of condemning them to pay service pay. The Court should appreciate that its financial constraints led to the failure to remit the contributions.
46. It is important to point out that the National Social Security Act, 2013, establishes a statutory mechanism for the recovery of unremitted contributions, including penalties for default. A comprehensive analysis of this mechanism reveals that it is designed to benefit the affected employee. It shall be remiss of this Court to allow a litigant to fashion an approach and remedy not provided in the Act, therefore.

47. Section 27 of the Act provides;

“ 1. If any contribution for which a contributing employer is required to pay the Fund is not paid within one month after the end of the month in which the last day of the contribution period to which it falls, a sum equal to five per cent of the amount of that contribution shall be added to the contribution for each month or part of a month that the amount due remains unpaid, and any such additional amount shall be recoverable at the same time and in the same manner as the contribution to which it is added.”

48. It is worth noting that Section 58 of the Act provides;  
“1. All sums due to the Fund shall be recoverable debts due to the Board and, without prejudice to any other remedy, shall be a civil debt recoverable summarily.  
2. An action for recovery of contributions or penalty under this Act may be instituted and conducted by an authorized officer of the Fund.”
49. In light of the cited provisions, this Court is not persuaded that the remedy sought by the Claimant is grantable, or even whether the Claimant has the requisite locus standi, to pursue the unremitted funds and penalties. Undoubtedly, the Claimant was a member of the NSSF by dint of section 35[6] of the Employment Act; he is not entitled to service pay.
50. Inarguably, the Respondent admitted that, due to the financial downturn that affected it, the Claimant was not paid his salary for a number of months, resulting in salary arrears. The Claimant claimed that he was not paid for 14 months. It is important to state that, having found as I have hereinabove that the Claimant considered himself dismissed as at 15th November 2023, I can only conclude that the arrears were only for 12 months.
51. There is no dispute that, out of the arrears, the Claimant at various times paid himself, under petty cash vouchers, in various amounts to reduce the arrears. The Claimant submits that the cumulative amount so paid was KShs. 875,400, while the Respondent asserted that the amount stood at KShs. 2,100,000. This Court has not lost sight of the fact that the Respondent’s witness acceded to Counsel for the Claimant’s suggestion during cross-examination that the sum derived from the vouchers, KShs. 1,965,000 would be correct.
52. Both parties cannot run away from this amount. Consequently, the Claimant is entitled to the salary for 12 months, less KShs. 1,965,000. Thus  $[12 \times 356,950] - 1,965,000 = 2,318,400$ . As this amount was earned but unjustifiably, and contrary to the law, not paid, it shall attract interest from 15th November 2023, at court rates till full payment.
53. In the upshot, judgment is hereby entered for the Claimant in the following terms;
- a) Salary arrears..... KShs. 2,318,400.
  - b) Interest on this sum awarded at court rates from 15th November 2023, till full payment.
  - c) Costs of the suit.

**Read Signed and Delivered this 23rd Day of April 2026.**

**OCHARO KEBIRA  
JUDGE**